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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-520

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,

Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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JURISDICTIONAL STATEMENT

The National Association of Regulatory Utility Commissioners (NARUC) appeals from the judgment of the United States District Court for the District of Columbia, entered on June 9, 1975, upholding a decision and order of the Interstate Commerce Commission, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the District Court for the District of Columbia is not yet reported. The opinion of the Interstate Commerce Commission is reported at 119 M.C.C. 327. The opinion of the District Court is attached hereto as Appendix A, and that of the Interstate Commerce Commission as Appendix B.

JURISDICTION

This suit was initiated on May 24, 1974 under 28 U.S.C., §1336 to enjoin and set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered on June 9, 1975, and a notice of appeal was filed in that Court on August 4, 1975. App. C. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C., §§1253 and 2101(b), and by 28 U.S.C., §2321n. (Feb., 1975 Supp. to U.S.C.A. Pocket Part For Use In 1975, 88 Stat. 1917, Sec. 10 of P.L. 93-584). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Pan-Atlantic Steamship Corporation* v. *Atlantic Coast Line Railroad Company*, 353 U.S. 436, 1 L. Ed. 2d 963, 77 S. Ct. 999 (1957); *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 25 L. Ed. 2d 547, 90 S. Ct. 1288 (1970).

QUESTIONS PRESENTED

1. Whether the lower Court erred by lightly inferring authority to preempt State laws related to the use of highways when: 1) Congress had not clearly ordained; 2) The subject matter had been exclusively regulated by the States for decades; 3) Previous claims of preemption had been rejected by the courts; 4) The Agency charged with implementing the Federal scheme for regulating motor carriers had never previously claimed authority to regulate the involved State laws to further that scheme; and 5) The preemption impacted on State registration laws pertaining to more than 50% of the authorities issued annually by the ICC.

2. Whether the ICC, under the authority of a statutory provision enacted in 1938, is empowered to prescribe uniform standards for State laws pertaining to the registration and identification of interstate motor carrier operations, when such alleged authority had never previously been claimed nor exercised and, in the interim, uniform standards had been promulgated in 1966 pursuant to provisions of the uniform State registration law enacted in 1965 (49 U.S.C., §302(b)(2)).

3. Whether the court below failed to give that respect due to the contemporaneous construction of a statute by all who had been involved in its passage and who had been charged with the duty to implement it.

4. Whether the court below, in its approach toward interpreting the meaning of statutory language, failed to apply this Court's requirement that words of a statute be placed within the context of the considerations governing Congress and the object sought to be accomplished.

5. Whether a Federal Agency acts arbitrarily and capriciously when the entire factual predicate for a rule it has promulgated was seriously contested in a rulemaking proceeding, and that Agency failed to deal explicitly with that issue in its report.

STATUTES INVOLVED

Sections 202(b)(1), (2), 205(f), and 210a(a) (49 U.S.C., §§302(b)(1), (2), 305(f), and 310a(a)) of the Interstate Commerce Act, as amended, and 5 U.S.C., §706 of the Administrative Procedure Act are set forth in Appendix D hereto.

STATEMENT

This is an appeal taken by the National Association of Regulatory Commissioners (NARUC) from a final order of the United States District Court for the District of Columbia, dismissing its complaint and affirming the order of the Interstate Commerce Commission issued in *State Registration of Emergency Temporary and Temporary Authority*, Ex Parte No. MC-67 (Sub-No. 2). The ICC order pertained to the regulation of State registration requirements for ICC-issued temporary authorities, a subject matter which had been covered by regulations determined seven years earlier by NARUC, pursuant to the provisions of 49 U.S.C., §302(b)(2). 49 C.F.R., Part 1023.

1. The NARUC And Its Role Under The Uniform State Registration Law (49 U.S.C., §302(b)(2))

The NARUC is a non-profit organization founded in 1889. Within its membership are the governmental bodies of the fifty States and the District of Columbia engaged in the regulation of carriers and utilities.

In 1965, Congress amended the Interstate Commerce Act to provide for a unique delegation of authority to the NARUC. Sec. 2 of P.L. 89-170, 79 Stat. 648, 49 U.S.C., §302(b)(2).

Sec. 2 of P.L. 89-170 provided that the NARUC, after consulting with the ICC and representatives of the motor carrier industry, shall determine uniform standards for the registration with the States of ICC-issued authorities, the identification of vehicles operated pursuant thereto, the filing of evidence of insurance, and the filing of designations of local agents for service of process. Standards determined by the NARUC, and officially certified by that organization to the ICC, would then be promulgated by the ICC as Federal standards.

NARUC's primary role in the determination of uniform standards was explained in no uncertain terms by the Interstate and Foreign Commerce Committee report on the bill which became P.L. 89-170.

> The National Association of Railroad and Utilities Commissioners (NARUC) would have the primary and exclusive right to determine the standards. The Interstate Commerce Commission's function would be a ministerial one — to "promulgate forthwith" standards determined by NARUC. Precedent for this approach is found in section 5 of the Safety Appliance Act (45 U.S.C. 5) as interpreted by the Supreme Court in St. Louis & Iron Mt. Ry. v. Taylor (28 S. Ct. 616, 210 U.S. 281, 52 L.Ed. 1061 (1907)).
>
> *Report To Accompany H.R. 5401*, H.R. Rep. No. 253, 89th Cong., 1st Sess., at 9 (1965).

The law further provided that State registration requirements which are consonant with NARUC-determined standards "shall not constitute an undue burden on interstate commerce" and, conversely, "to the extent that any State requirements for registration of motor carrier certificates or permits issued by the Commission impose obligations which are in excess of the standards . . . , such excessive requirements shall . . . constitute an undue burden on interstate commerce." 49 U.S.C., §302(b)(2). Different standards for various classes of carriers were also authorized. *Id.* In the event the NARUC failed to determine and certify standards within eighteen months of final approval of the law, then the ICC was authorized to promulgate such standards unilaterally. *Id.*

Standards were determined by NARUC and promulgated forthwith by the ICC in 1966. 49 C.F.R., Part 1023.

2. Proceedings Below

On August 20, 1973, the ICC issued a Notice of Proposed Rulemaking in Ex Parte No. MC-67 (Sub-No. 2), wherein the Commission proposed the issuance of a rule to regulate State requirements for the registration and identification of carrier operations initiated pursuant to temporary operating authorities granted by the ICC under 49 U.S.C., §310a(a).

As indicated above, comprehensive regulations pertaining to State registration requirements had previously been determined by the NARUC and promulgated by the ICC in 1966, pursuant to the provisions of 49 U.S.C., §302(b)(2). 49 C.F.R., Part 1023. Special consideration was even given at that time to State requirements for registering temporary authorities. It was determined that carriers, which had previously registered an authority with a State and later been issued by the ICC an emergency temporary authority with a duration of 30 days or less, could begin operations after informing State authorities in writing of the issuance of the emergency authority. 49 C.F.R., Sec. 1023.11, reprinted in App. E. Under all other circumstances, a carrier issued either a permanent or temporary authority by the ICC could be required by a State to file a copy of its ICC authority before beginning operations therein. 49 C.F.R., Sec. 1023.13, reprinted in App. E.

The rule proposed and eventually adopted by the ICC (Report and Order, App. B, p. 20a) is worded in a very confusing way, but it is apparently intended to provide that, regardless of any previous registration by a carrier of another ICC-issued authority, a carrier may begin operations in a State pursuant to a temporary authority granted for *90* days or less, by simply informing a State commission in writing that it has such authority. The ICC suggested that the rule was necessary because of State-caused delays in providing transportation service under temporary authorities. The

ICC never substantiated its allegations concerning these State-caused delays, nor did any carrier or shipper. In fact, not a single shipper and only one carrier submitted comments in the proceeding.

In its Report and Order, the Commission rejected NARUC's contentions that promulgation of the rule was not authorized because NARUC had neither determined nor certified the change in standards for State registration of temporary authorities, as required by 49 U.S.C., §302(b)(2). (NARUC was never even asked to consider it).

What the Commission did in the rulemaking proceeding was to assert, *for the first time since the passage in 1938 of 49 U.S.C., §310a(a),* that it was authorized under that Section to regulate State registration requirements for temporary authorities. The Commission was at a loss to explain how, in the interim, 49 U.S.C., §302(b)(2) had been enacted and implemented, with full Commission approval and Congressional awareness, to cover both permanent and temporary authorities. See pp. 16-18, *infra*.

The lower Court upheld ICC's assertion of jurisdiction on the basis that 49 U.S.C., §302(b)(2) is "clear and unambiguous in its use of the precise terms of 'certificates' and 'permits'." Op., App. A, p. 7a. The lower Court, like the ICC, made no effort to reconcile this conclusion with the fact that those same "precise terms" had been interpreted, by all those contemporaneously involved in implementing that specific statutory provision, as relating to ICC-issued operating authorities, both permanent and temporary. The lower Court did, however, have considerable difficulty with ICC assertions concerning State-caused delays (Op., App. A, pp. 9a-10a), to the point where it even suggested that the ICC may want to consider the entire matter.

To convey why the regulations promulgated in 1966 pursuant to the provisions of 49 U.S.C., § 302(b)(2) covered both

permanent and temporary authorities, it is essential that some information be presented on the statute's specific legislative history and the general purposes behind the passage of the entire P.L. 89-170.

3. Public Law 89-170

P.L. 89-170 was a remedial statute. Congress was concerned about the economic damage being perpetrated on regulated carriers by the unabated "transportation of nonexempt commodities on a for-hire basis by persons not having authority to do so from the Interstate Commerce Commission or a State regulatory commission." H.R. Rep. No. 253, *supra*, p. 5. It was estimated that illegal carriage diverted over a billion dollars annually from regulated carriers. *Id.*, at 6.

Section 3 of P.L. 89-170 amended the Interstate Commerce Act to extend civil forfeiture provisions to unlawful operations. Section 4 enabled the ICC to institute a civil action against a carrier in any State where it operates, and to join in such action any shipper without regard to other restrictions on where the shipper may be served. Section 5 enabled any person injured by an unauthorized operation to apply for injunctive relief in a U.S. District Court. Sections 6 and 7 permitted shippers to recover reparations for unreasonable charges.

Sections 1 and 2 provided means for enhancing Federal-State cooperation in the battle against unauthorized carriage.

Section 1 amended Section 205(f) of the Act (App. D) to authorize the ICC to enter into cooperative agreements with the States to enforce State and Federal economic and safety laws concerning highway transportation, including the mutual exchange of information on violations. Pursuant to this statutory provision, nearly every State has entered into a cooperative agreement with the ICC.

The content of Section 2 (49 U.S.C., §302(b)(2)) we briefly described above. Its purposes were twofold: 1) Encourage further State use of operating authority registration requirements as means of detecting illegal carriers and prosecuting them under State law; and 2) Promulgate uniform standards for such State requirements to relieve carriers from complying with a wide variety of State laws.[1]

---

[1] These two purposes were succinctly summarized in the report by the Senate Committee on Commerce on S. 1727, the companion bill to H.R. 5401 which became P.L. 89-170:

> "At present, registration requirements differ widely among the States; this circumstance alone may impose undue burdens on carriers. Enactment of this section is necessary in order that relief from this multiplicity of different State registration requirements be achieved.
>
> "Equally important, *this section would assist in the complete implementation by the States of existing operating authority registration requirements. In recent years, an ever-increasing number of States have required interstate carriers to register with the States the operating authority issued by the Interstate Commerce Commission.* This action by a growing number of States gives every indication of developing as an essential element in the curbing of those who operate outside of the law. The Committee has approved this section in order that States can use such registration laws to intensify State enforcement activities against illegal carriers. A carrier operating without Interstate Commerce Commission authority will, of course, have no authority to register with a State. Thus, if a State requires registration, an unauthorized carrier can be prosecuted by the State for violation of the State registration law. In this way, illegal interstate operators can be restrained by State authorities. The use of uniform registration standards should also assist in the discovery and prosecution of the illegal operator." (Emphasis supplied).

Committee on Commerce, *Report To Accompany* S. 1727, S. Rep. No. 387, 89th Cong., 1st Sess., at 5 (June 30, 1965).

4. Background To Passage Of Uniform State Registration Law

For decades, a majority of the States have required interstate carriers to register and identify their operations prior to the use of their highways. In 1961, thirty two (32) States had such requirements.[2]

These State requirements normally covered carriers who had been issued either permanent or temporary operating authorities by the ICC, and for good reason! A State, which was determined to keep a watchful eye on commercial users of their highways to ensure that such users were properly authorized and had also abided by State laws designed to protect State citizens (e.g., filing of designations of local agents for service of process), would naturally *not exclude from its surveillance more than 50% of the operating authorities issued annually by the ICC.*

During 1961, for example, the ICC issued a total of 4,873 motor carrier operating authorities, of which 2,661 (or 54.6%) were temporary operating authorities.[3] During 1965, when P.L. 89-170 was debated and passed, 8,233 authorities were issued by the ICC, of which 4,389 (or 53.3%) were temporary operating authorities.[4] Appendix G provides data on the number of permanent and temporary authorities issued by the ICC for the years 1958 through 1965.

a. Case Law On State Registration Requirements

As could be expected, these State requirements did not escape attack by carriers in the courts. Various carriers asserted over the years that such State laws were either undue

[2] Doyle Report, *National Transportation Policy-Report Prepared for the Committee on Interstate and Foreign Commerce*, 87th Cong., 1st Sess., at 534 (1961).

[3] Data extracted from ICC *75th Annual Report*, pp. 66-68 (1961).

[4] Data extracted from ICC *79th Annual Report*, pp. 102-3 (1965).

burdens on interstate commerce in violation of the interstate commerce clause of the United States Constitution[5] or, after the passage of the Motor Carrier Act, 1935 (49 U.S.C., §§301 *et seq.*), were preempted by the federal scheme embodied in that Act.

This Court has consistently held that State laws related to the registration and identification of interstate carrier operations are proper exercises of the States' police power and, thus, violate neither the Commerce Clause of the Constitution nor the provisions of the Motor Carrier Act, 1935, unless a State attempts to use the requirements to make discretionary determinations, on economic grounds, on who may and who may not engage in interstate commerce. See *Fry Roofing Co.* v. *Wood*, 344 U.S. 157, 97 L. Ed. 168, 73 S. Ct. 204 (1953); Cf. *Buck* v. *Kuykendall*, 267 U.S. 307, 69 L. Ed. 623, 45 S. Ct. 324 (1925).

Many of the cases involving State registration and identification requirements involved related fees charged to carriers and other State taxes charged for the use of the highways and the administration of State highway laws. See, e.g., *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U.S. 285, 79 L. Ed. 1439, 55 S. Ct. 709 (1935); *Aero Mayflower Transit Co.* v. *Board of Railroad Commissioners*, 332 U.S. 495, 92 L. Ed. 499, 68 S. Ct. 167 (1947); *Capitol Greyhound Lines, Inc.* v. *Brice*, 339 U.S. 542, 94 L. Ed. 1053, 70 S. Ct. 806 (1950).

The Court in *Capitol Greyhound Lines, supra*, upheld the State tax involved, and further suggested that the carriers turn to Congress if they wanted new rules on State tax laws because Congress had previously determined that nothing in the provisions of the Motor Carrier Act "shall be construed to affect the powers of taxation of the several

[5] Article I, Section 8, Clause 3.

states . . . " 49 U.S.C., §302(b)(1). 339 U.S. 543, 547-8, 97 L. Ed. 1053, 1057-8.[6]

b. Legislative Developments

During the 1950's, carrier complaints about these State requirements grew. They complained that the State laws were costly and burdensome; they were particularly vexed by the diversity in the laws. Given the case law we briefly described above, *and the fact that the ICC never once intimated that it thought it already had authority to preempt, either totally or selectively, these State laws,* the carriers turned—appropriately, given our system of government—to Congress in 1958 for relief. Thus began a long, legislative battle which culminated with the passage in 1965 of 49 U.S.C., §302(b)(2). Some highlights of this battle are described below:

1. In 1958, and again in 1959, identical bills were introduced, at the urging of carriers, by Representative Huddleston of Alabama which would have prohibited a State

[6] The Court in *Capitol Greyhound* explained further why new Congressional action would be needed (339 U.S. 543, 547-8, 97 L. Ed. 1057-8, fn. 8):

> Congress has passed comprehensive legislation regulating interstate carriers in which it is declared that "nothing in this chapter shall be construed to affect the powers of taxation of the several states . . .". 49 USCA §302 (b), FCA title 49, § 302 (b). See Brashear Freight Lines v. Public Service Com. (DC Mo) 23 F Supp 865; see also Maurer v. Hamilton, 309 US 598, 84 L ed 969, 60 S Ct 726, 135 ALR 1347. *It is interesting to note that the Interstate Commerce Commission charged with the duty of fixing rates and administering the Motor Carrier Act requires carriers to keep accounts showing the "cost of all taxes, licenses and fees assessed for the privilege of operating revenue vehicles over the highways, such as registration fees, license plate fees. . . . certificates of title fees . . . and similar items. . . ."* Title 49 §182.5220, CFR 1947 Supp. (Emphasis supplied).

from imposing any registration requirements on ICC-authorized carriers.[7] The bill would have amended then §202(b) of the Act (that section pertaining to nonintervention in State tax laws and intrastate commerce) by adding a proviso thereto. No action was taken on these bills.

2. In 1962, the ICC supported passage of a bill which would have authorized the Commission to determine and promulgate uniform standards for State requirements pertaining to the registration of a "certificate of public convenience and necessity or a permit," the identification of vehicles operated pursuant thereto, the filing of policies of insurance, etc. Section 1 of S. 2560 of the 87th Congress, reprinted in Appendix F. This proposal also would have amended Sec. 202(b) of the Act and would have required the ICC to protect carriers "from a duty to file or otherwise comply with State requirements that, in the opinion of the Commission, might constitute an *undue burden, financial, administrative, or otherwise,* on the operations of such carriers." *Id.* (Emphasis supplied).

The Chairman of the ICC testified that the coverage of the bill would extend to *operating authorities* issued by the ICC. He stated:

> Under section 1 of the revised bill, the Commission would be required to establish uniform standards respecting State requirements for the registration, identification, and insurance filings *of motor common and contract carriers holding operating authority from the Interstate Commerce Commission.*
>
> *Hearings on S. 2560 and S. 2764 Before The Surface Transportation Subcomm. of the Senate Comm. on Commerce,* 87th Cong., 2d Sess., at 103-104 (Emphasis supplied).

[7] H.R. 12846 (85th Congress) and H.R. 5175 (86th Congress).

By 1962 the American Trucking Associations, Inc. (ATA) supported the concept of setting uniform State registration standards, thereby reversing its earlier position that the Federal government should prohibit *all* State filing requirements of ICC-issued authorities. The rationale for the switch in the ATA's position was that State registration requirements, enforced by State personnel, were necessary "to deal with the paramount problem of illegal operations." See Statement of James F.Pinckney on behalf of the ATA, *Hearings on S. 2560 and S. 2764, Id.*, at 31-34.

The NARUC opposed the enactment of Section 1 of S. 2560, citing, among other matters, NARUC's ongoing, voluntary activities to promote uniformity among the States in the regulation of motor carriers, including the development of standard forms for "registering authorizations issued by the Interstate Commerce Commission." Letter from Austin L. Roberts, Jr., General Solicitor of the NARUC, to Senator George A. Smathers, Chairman of the Surface Transportation Subcommittee. *Hearings on S. 2560 and S. 2764, Id.*, at 274-275.

The 87th Congress did not enact a uniform State registration law. In 1963, the Commission again urged Congress to enact legislation which would provide for the ". . . establishment of greater uniformity in state requirements for *the registration of operating authorities of interstate motor carriers.*" ICC *78th Annual Report*, at 74 (1964). (Emphasis supplied).

There is no question that a temporary authority is an operating authority. Without a temporary or a permanent authority, a carrier has no right to transport regulated carriage in interstate commerce. On April 7, 1965, the Commission promulgated its first comprehensive regulations pertaining to temporary authorities, defining such an authority as a *"Limited-term motor carrier operating authority issued for periods up to 180 days . . . ."* 49

C.F.R., Sec. 1131.1(b)(1), reprinted in App. E. (Emphasis supplied).

3. On May 10, 1965, the Commission testified on the bill which eventually became P.L. 89-170, with Chairman Webb explaining that the terms "certificate" and "permit," as used in Sec. 2 of the bill, meant "operating authority," and that the States, through NARUC, would set standards for registering "Federal operating authorities."[9]

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[9] The following is an extract of Chairman Webb's dialogue with Senator Lausche on this point:

"Senator Lausche. On this item, will you illustrate for the record just what the word 'standards' comprehends within the meaning of the inclusion in this bill?

"Mr. Webb. 'Standards' relates to the requirements for the registration of certificates and permits—that is, operating authority. It relates to what the carriers must do in the various States in the way of evidencing within the States their Federal operating authorities.

"Senator Lausche. In other words, the States would adopt certain standards of what has to be done with respect to registration within the State?

"Mr. Webb. Yes.

"Senator Lausche. To show what its authority is? How many vehicles it has? Would that be within it?

"Mr. Webb. Yes, that is correct. The State legislation often provides that it shall be unlawful for a carrier to operate within the State if it is not authorized to do so by the Interstate Commerce Commission.

"At the present time, the requirements of the States vary widely, and this provides simply for a uniform State registration to be determined by the State commissioners."

Hearings on S. 1142 [and 16 related bills, including S. 1727 and H.R. 5401] *Before the Surface Transportation Subcomm. of the Comm. on Commerce*, 89th Cong., 1st Sess., Ser. No. 89-32, at 53-54 (1965).

The NARUC supported the passage of what became Section 2 of P.L. 89-170, explaining in its testimony that the language in the section was the result of months of meetings between members of an Ad Hoc Committee appointed by the NARUC Executive Committee to deal with the problem, and representatives of the Interstate Commerce Commission and all segments of the motor carrier industry. See Statements of Noel A. Clark, President of the NARUC, and Walter R. McDonald, Chairman of the NARUC Ad Hoc Committee, in *Hearings on S. 1142* [and 16 related bills, including S. 1727 and H.R. 5401] *supra*, at 243-4.

The ATA again supported in principle the continuation of State filing requirements, as long as such requirements were to be made uniform. Statement of James F. Pinckney, *Id.*, at 83.

5. Implementation Of 49 U.S.C., §302(b)(2)

49 U.S.C., §302(b)(2) provided that, within eighteen months after its passage, the NARUC, after consulting with the ICC and representatives of the motor carrier industry, shall determine standards for State registration requirements and officially certify them to the ICC. As so certified, the ICC shall promulgate them forthwith. In the event NARUC failed to determine and certify standards within the eighteen month period, then the ICC was authorized to promulgate such standards unilaterally.

The NARUC did not fail to implement the delegation of authority it received from Congress. It consulted with motor carrier representatives. It consulted with the ICC, *through an ad hoc committee of three ICC Commissioners* specially set up for that purpose. The ICC reported to Congress on this development, with evident satisfaction.[10]

[10] In its *80th Annual Report* (1966) to Congress, the ICC stated (p. 82):

(continued)

On November 17, 1966, the NARUC, assembled at its 78th Annual Convention, determined initial standards and later certified them to the ICC. The ICC, thereupon, promulgated them into law on December 14, 1966 as "Standards for Registration of Certificates and Permits with States." 31 Fed. Reg. 16567-16575 (Dec. 28, 1966).[11] These standards for State registration of certificates and permits covered *both* permanent and temporary operating authorities issued by the ICC. 49 C.F.R., Secs. 1023.1(d) and 1023.11. The ICC reported to Congress, again with obvious satisfaction, that standards had been set for the "various requirements of the States under which motor carriers register *our operating authorities, ...*" *ICC 81st Annual Report*, at 13-14 (1967). (Emphasis supplied).[12]

[10] (continued)

> *To implement the cooperative agreement and uniform registration provisions of Public Law 89-170 (H.R. 5401, Sept. 6, 1965), our ad hoc committee, consisting of three commissioners, along with members of our staff, had worked closely with the National Association of Railroad and Utilities Commissioners.* We have exchanged views and have considered proposals offered by the association. We are hopeful for early agreement as to the principles involved, and *we look toward prompt promulgation of rules by which to effect uniformity among the States in registration of ICC operating authorities,* registration and identification of vehicles, filing evidence of insurance, and designation of process agents. Similarly, we hope soon to be able to enter into formal cooperative agreements with the States to improve enforcement of economic and safety laws and regulations of the various States and the United States concerning highway transportation. (Emphasis supplied).

[11] The standards were originally codified as 49 C.F.R., Part 177b, and later re-codified as 49 C.F.R., Part 1023. See 32 Fed. Reg. 20016 (Dec. 20, 1967). Citations to the standards have been to the re-codified Part, unless otherwise stated.

[12] The ICC reported to Congress on the promulgation of the initial standards, as follows (ICC *81st Annual Report*, at 13-14, 1967):

(continued)

Thus, *all those contemporaneously involved* in the passage and implementation of the uniform State registration law understood that its coverage would and should apply to operating authorities issued by the ICC, both permanent and temporary. There is nothing to indicate that there was any disharmony on this point. The ICC, in word and deed, encouraged and endorsed the application of the provisions of the statute to all of its operating authorities.

THE QUESTIONS INVOLVED ARE SUBSTANTIAL

This is a case of first impression, involving the interpretation of a statutory provision containing a unique delegation of authority to the NARUC, an association of State regulatory commissioners, to prescribe Federal uniform standards for certain State laws. Further, that same statutory provision (49 U.S.C., §302(b)(2)) is the first Federal law pertaining to State requirements and fees related to the registration and identification of interstate carrier operations. Prior to the passage of that law, each State had the right, to the extent not forbidden by the Commerce Clause of the Constitution, to set its own rules respecting the registration and identification of those engaged in interstate commerce and using their highways. Such laws applied to interstate operations regulated by the ICC and to

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[12] (continued)

We promulgated regulations (49 CFR 177b) for the uniform registration provisions of Public Law 89-170. *These standards were developed through close cooperation with the States.* The standardization of the various requirements of the States under which motor carriers register our operating authorities; register and identify vehicles; and file evidence of insurance and process agents will enhance motor transportation enforcement at all levels. At the same time, the regulated industry will derive benefits in reduction of paperwork and the multiplicity of registration procedures now in existence. (Emphasis supplied).

exempt activities. Fees imposed on carriers for such requirements were also discretionary with each State, again within Constitutional limitations.

When pressure built, in the early 1960's, in the halls of Congress for Federal intervention in what had previously been within the exclusive domain of the individual States, the States, through their State regulatory commissioners and the NARUC, thought a workable compromise was developed and passed in the provisions of 49 U.S.C., §302(b)(2). Under that provision, limits were to be set on the individual States' discretion to impose requirements on ICC-regulated carriers, but such limits were to be determined by the State commissioners themselves in the form of uniform standards. Congress, further, gave positive support to the concept of States using registration requirements for ICC-regulated carriers as a means for distinguishing between authorized and unauthorized carriage.

As described and discussed above, standards were issued as contemplated by 49 U.S.C., §302(b)(2). Various application forms were prescribed. 49 C.F.R., Part 1023, Appendix of Forms. Maximum fees were prescribed. 49 C.F.R., Secs. 1023.13, 1023.33. An entire system for identifying vehicles engaged in lawful operations was determined. 49 C.F.R., Part 1023, Subpart D. As previously discussed, special consideration was given to the registration of temporary authorities of 30 days duration or less. 49 C.F.R., Sec. 1023.11.

Only some seven years after all the above took place did the ICC suggest that 49 U.S.C., §302(b)(2) did not apply to the thousands of temporary authorities issued annually! See App. G.

It should be emphasized that compliance with the standards determined by NARUC is *not* an issue in this proceeding. The ICC has arrogated to itself authority to regulate State registration requirements for temporary authori-

ties, and has issued a regulation which impacts on States which are, in fact, operating in full compliance with the standards in 49 C.F.R., Part 1023. For those occasional situations wherein a question of compliance arises, the courts have been, and will be, available to enforce the law. See, e.g., *State of Montana ex rel. Sammons Trucking, Inc.* v. *Boedecker*, 492 P. 2d 919 (1972), wherein the Montana Supreme Court, in a class action instituted by common carriers operating in that State, held that the fees required by Montana law for registering vehicles exceeded the maximum fees authorized by the standards and were, therefore, unlawful.

What is at issue is that the ICC is clearly engaged in a "bootstrap operation" to give itself jurisdiction over matters clearly denied it. It is making a mockery of the legislative-administrative process, which this Court should not countenance. It is unjustifiably denying to State regulators the opportunity to determine standards and related fees for the registration of more than 50% of the operating authorities issued annually by the ICC. It is further jeopardizing the enforcement aims Congress had in mind when it enacted P.L. 89-170. To add insult to injury, the factual premise for ICC's attempted jurisdictional "coup"—i.e., lengthy delays caused by States in the provision of transportation service—is simply untrue and remains unsubstantiated. Even the lower Court suggested that "the Commission may have dealt more explicity with the matter of length of delay" (App. A, p. 9a), and went so far as to suggest that the ICC may want to reconsider the entire matter.

1. The Lower Court Lightly Inferred To The ICC Authority To Preempt State Law, Contrary To This Court's Guidances On The Matter

The Court below held that State requirements for the registration of temporary operating authorities were not intended to be covered by the uniform standards to be promulgated pursuant to the provisions of 49 U.S.C., §302(b)(2).

Having been intimately involved in both the passage and implementation of 49 U.S.C., §302(b)(2), we are firmly of the conviction that the lower Court was wrong on this jurisdictional issue.

The lower Court appears to have gone astray by failing to take a hard look at the legal and factual situation within which *Congress* was working when it considered and passed P.L. 89-170. See pp. 10-16, *supra*. The lower Court *assumed, without any analysis,* that the ICC had, in 1935, been granted authority to preempt State registration requirements for ICC-issued operating authorities, and that such authority naturally extended to the registration of temporary authorities when 49 U.S.C., §310a(a) was enacted in 1938. This assumption is clearly evident in the following language in the Court's opinion: "The statutory provision [i.e., 49 U.S.C., §302(b)(2)] which *withdraws from the ICC authority over regulating State registration requirements* is clear and unambiguous in its use of the precise terms of 'certificates' and 'permits.' " App. A, p. 7a.

Once the lower Court made the assumption that 49 U.S.C., §302(b)(2) revolved around a *withdrawal* of authority previously held by the ICC, it was simple for the Court to conclude that such "withdrawal" should be narrowly construed to exclude registration of temporary operating authorities.

This assumption on the part of the lower Court is extremely difficult to justify; for, prior to the initiation of the instant proceeding before the ICC, not once since the passage of the Motor Carrier Act in 1935 had the ICC ever suggested that it had authority to regulate State registration requirements for either permanent or temporary operating authorities.[13] In the interval, 49 U.S.C., §302(b)(2) was enacted and implemented to cover both permanent and temporary authorities, with the full blessings of the ICC, the motor carrier industry, and Congress.

This Court has frequently reiterated the proposition that preemption is never to be lightly inferred merely from the comprehensive character of a Federal regulatory scheme. Cf. *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405, 415, 37 L. Ed. 2d 688, 696, 93 S. Ct. 2507 (1973); *Askew* v. *American Waterways Operators*, 411 U.S. 325, 36 L. Ed. 2d 280, 93 S. Ct. 1590 (1973).

A Court should hold that State laws are preempted only after *finding* that Congress has either "unmistakably so ordained," or "the nature of the regulated subject matter permits no other conclusion." *Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 142, 10 L. Ed. 2d 248, 256-7, 83 S. Ct. 1210 (1963).

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[13] When 49 U.S.C., §310a(a) was proposed and enacted in 1938, it was described as a "noncontroversial" proposal to improve the ICC's internal machinery because of the time required for formal hearings on permanent applications. *Hearings Before a Subcomm. of the Sen. Comm. on Interstate Commerce on S. 3606*, 75th Cong., 3rd Sess., at 5 (1938).

Case law on temporary authorities has revolved around what the ICC must find, or what internal procedures the Commission is authorized to follow, concerning applications for temporary authority. See, e.g., *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 25 L. Ed. 2d 547, 90 S. Ct. 1288 (1970).

There is certainly nothing in the provisions of the Motor Carrier Act, 1935, as amended, which unmistakably provides the ICC with authority to regulate State registration requirements and related fees. To the contrary, 49 U.S.C. §302(b)(1) specifically precludes the ICC from interfering with State taxes.

Nor is there anything about the nature of the regulated subject matter which "permits no other conclusion." Even the lower Court seriously questioned the ICC's unsubstantiated assertions about State-caused delays. App. A, pp. 9a-10a. Very significant is the fact that the ICC made *no* claim, between 1938 and 1973, that effective implementation of the power it was granted to issue temporary authorities depended on its regulation of State registration requirements pertaining to them. On this point, we believe Justice Frankfurter's comments, when rejecting the FTC's effort to regulate intrastate sales, are particularly appropriate:

> That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred. See Norwegian Nitrogen Products Co. v. United States, 288 US 294, 315, 77 L. Ed. 796, 807, 53 S Ct. 350. This practical construction of the Act by those entrusted with its administration is reinforced by the Commission's unsuccessful attempt in 1935 to secure from Congress an express grant of authority over trans-

actions "affecting" commerce in addition to its control of practices in commerce. S. Rep. No. 46, 74th Congress, 1st Sess.

Federal Trade Commission v. *Bunte Brothers, Inc.*, 312 U.S. 349, 351-2, 85 L. Ed. 881, 885-6, 61 S. Ct. 580 (1941).

2. Contemporaneous Construction Of An Act Deserves Great Respect

This is a perfect case for application of that ancient principle of statutory construction that the "contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." *Edwards' Lessee* v. *Darby*, 12 Wheat. 206, 210 (1827). Cf. *Power Reactor Development Co.* v. *International Union of Electrical, Radio, and Machine Workers*, 367 U.S. 396, 408, 6 L. Ed. 2d 924, 932, 81 S. Ct. 1529 (1961); *Bingler* v. *Johnson*, 394 U.S. 741, 750-751, 22 L. Ed. 2d 695, 703-704, 89 S. Ct. 1439 (1969).

If, as the lower Court held, the wording of 49 U.S.C., §302(b)(2) is "clear" in restricting NARUC to determining standards for permanent authorities, then how does that Court account for the fact that all those contemporaneously involved in implementing the statute—i.e., the ICC, the NARUC, and representatives of the motor carrier industry—participated in the development and promulgation of regulations covering both permanent and temporary authorities? The Court offered no account of that development, and gave no weight to it in reaching its conclusion. Nor does the Court suggest that there is any reconciliation between the ICC's position on this matter when the statute was implemented in 1966, and the ICC's position developed seven years later for purposes of the rulemaking proceeding involved in this case.

3. Words Are Inexact Tools, At Best

The lower Court held that congress authorized NARUC to determine standards only for permanent authorities. In reaching this statutory interpretation, the Court clearly did not guide itself by "the evils which existed, the remedy prescribed, the object to be accomplished, and the considerations by which the lawmakers were governed . . . ." *Stewart* v. *Kahn*, 11 Wall. 493, 20 L. Ed. 176, 178 (1871).

Congress wanted standardization of State registration requirements. There is absolutely no indication that Congress intended to exclude temporary authorities from the standards contemplated by 49 U.S.C., §302(b)(2) and, thereby, leave more than 50% of the annual operating authorities issued by the ICC subject to the diverse registration requirements of the States. Congress also directed that standards be promulgated within 18 months after passage of the law, which was done.

Clearly, 49 U.S.C., §302(b)(2) is, as were the other provisions contained in P.L. 89-170, remedial in nature. It is axiomatic that provisions of remedial legislation should be given a liberal construction consistent with the Act's overriding purpose. Cf. *United States* v. *An Article of Drug*, 394 U.S. 784, 22 L. Ed. 2d 726, 89 S. Ct. 1410 (1969); *Tcherepnin* v. *Knight*, 389 U.S. 332, 19 L. Ed. 2d 564, 88 S. Ct. 548 (1967).

The lower Court, nevertheless, stated that the words in 49 U.S.C., §302(b)(2) are clear, and that, under such circumstances, "any exhaustive discussion of or indeed resort to the legislative history to resolve the issue presented would be unnecessary and improper in this case." App. A., p. 7a. The lower Court's position neglects the remedial nature of the law and the evils to be proscribed by its implementation, and is also inconsistent with this Court's recent statements on interpretation of statutory language.

For example, in *Tidewater Oil Co.* v. *United States*, this Court explained (409 U.S. 151, 157, 34 L Ed. 2d 375, 382-3, 93 S. Ct. 408 (1972)):

> But, while the clear meaning of statutory language is not to be ignored, "words are inexact tools at best," *Harrison* v. *Northern Trust Co.*, 317 US 476, 479, 87 L Ed 407, 63 S Ct 361 (1943), and hence it is essential that we place the words of a statute in their proper context by resort to the legislative history. Nowhere is this better illustratd than in this case.
>
> Even more recently, this Court declared:
>
> "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Church of the Holy Trinity* v. *United States*, 143 US 457, 459, 36 L Ed 226, 12 S Ct 511 (1892).
>
> *Philbrook* v. *Glodgett*, 44 L. Ed. 2d 525 (1975).

There is no magic in particular words without reference to the purpose and background of a statute. Even in regard to the phrase "temporary authority," this court has previously described it as a "temporary permit" and, in order to implement the remedial provisions of the APA, has construed a temporary authority to be a "certificate" or "permit" for purposes of that Act. *Pan-Atlantic Steamship Corp.* v. *Atlantic Coast Line R. Co.*, 353 U.S. 436, 438-9, 1 L. Ed. 2d 963, 966, 77 S. Ct. 999 (1957).

Considering the Congressional purposes behind the enactment of 49 U.S.C., §302(b)(2), which were fully implemented in 1966, a temporary authority should similarly be construed to be a "certificate" or "permit" for the purposes of that provision.

4. The Commission's Decision Was Arbitrary, Capricious, And Without Support in The Record

Assuming, *arguendo*, the Commission is authorized to regulate, at its discretion, State registration requirements for temporary authorities, the Commission's decision was arbitrary, capricious, and unsupported by the record, and should be reversed as contravening 5 U.S.C. §706(2)(A) of the Administrative Procedure Act.

First, the Commission alleged in its Notice of Proposed Rulemaking that the process for registering temporary operating authorities with the States "usually takes between 10 and 14 days." Report and Order, App. B, at 12a. There is absolutely nothing in the record to substantiate this allegation. The one and only participant in the proceeding that supported the Commission's proposed rule discussed fees for registration, not delays caused by State requirements. *Id.*, at 13a. How the Commission determined that the process "usually takes between 10 to 14 days" was, and remains to this day, a total mystery. No specific finding of fact was made on this rather crucial matter. See "Findings" in Report and Order, App. B, p. 19a.

Equally important was the Commission's total failure to examine the *overlap* between the alleged delays caused by State registration requirements and the delays caused by the Commission's own requirements. These ICC requirements are those which carriers must fulfill *after* they have been issued temporary authorities, but *before* they can "get on the road."

According to representations made by carriers and shippers, who were complaining about *ICC*-caused delays in *granting* temporary authorities only several months before the initiation of the proceeding involved herein, there is usually a "10 to 15 days' time lag between the granting of temporary authority and the granting of special permission

[by the ICC] enabling the publication of rates on short notice. . . ." *Motor Carrier Temporary Authority*, Ex Parte No. MC-67 (Sub-No. 1), 118 M.C.C. 444, 446 (June 14, 1973). There is nothing to prevent a carrier from beginning the registration process with a State while awaiting this special permission from the ICC to file its tariffs on short notice. This fact was brought to the ICC's attention, but has never been addressed by the Commission.

Further, Congress enacted P.L. 89-170 to enhance the capabilities of the States to detect illegal operations. Given such Congressional intent, it is unreasonable and arbitrary for the ICC to force the States, for all practical purposes, to depend on self-serving declarations of carriers.

The Commission's ruling below should be declared invalid by this Court not only because of the patent weaknesses in its statutory interpretations, as discussed in previous sections of this Statement, but also because the ruling is otherwise capricious, arbitrary, lacking any support in the record, and unrealistic. See, e.g., *United States* v. *Cartwright*, 411 U.S. 596, 36 L. Ed. 2d 528, 93 S. Ct. 1713 (1973).

CONCLUSION

It is submitted that the Court below, by its decision, has erroneously removed from State regulatory commissioners, through their association, the NARUC, the right to determine uniform standards, for State registration of ICC-issued temporary authorities. The lower Court failed to give any weight in its interpretation of the scope of 49 U.S.C., §302(b)(2) to the contemporaneous construction of that statute by all involved in its passage and implementation. It further lightly assumed that the ICC was authorized to regulate State registration requirements since 1935 when, in fact, such authority had never been claimed until 1973 and, in the interim, 49 U.S.C., §302(b)(2) was passed and

implemented. In addition, it failed to place the words of the involved statute within the context of the purposes to be accomplished and the evils to be remedied by its passage. The lower Court further erred by upholding the validity of an unrealistic rule issued capriciously and without support in the record of the factual predicate on which it was based.

The questions presented by this appeal are substantial, are of immediate public importance, and require plenary consideration with briefs on the merits and oral argument.

Respectfully submitted,

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October 3, 1975

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 74-790 Civil

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

Before: **FAHY, *Senior Circuit Judge,* and ROBINSON and RICHEY, *District Judges***

June 9, 1975

OPINION

The National Association of Regulatory Utility Commissioners (hereinafter NARUC) is a quasi-governmental organization whose members represent the governmental bodies of the fifty states and the District of Columbia engaged in the regulation of carriers and utilities. NARUC brings this action against the Interstate Commerce Commission (hereinafter the ICC or the Commission) and the United States to enjoin, set aside and annul orders of the ICC issued in *State Registration of Emergency Temporary and Temporary Authority,* Ex Parte No. MC-67, 119

M.C.C. 327.[1] Pursuant to 28 U.S.C. §2325, a Three-Judge Court was convened to determine this question. The Court having reviewed the briefs and heard oral argument by the parties concludes that the Commission's action challenged herein was within the scope of the authority conferred upon it by Congress and conformed to procedural requirements. Therefore the Commission's decision must be sustained.

A brief history of the dispute giving rise to this litigation and an overview of the regulatory scheme involved is hereafter set forth in explanation of the Court's decision.

Motor carriers of passengers or property are required to have operating authority from the ICC in order to provide services lawfully on interstate commerce.[2] There are two classes of regulated motor carriers, common carriers and contract carriers.[3] Permanent operating authorities for the former are denominated certificates of public convenience and necessity ("certificates"); for the latter, they are denominated "permits." "Certificates" and "permits" are issued only after full adversary proceedings, replete with procedural safeguards.

In addition to the above, the ICC has authority to issue temporary authorities to meet immediate transportation needs, pursuant to 49 U.S.C. §310a(a).[4] This provision,

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[1] By Order issued May 24, 1974, the ICC has suspended the effectiveness of the Order pending a resolution of this action.

[2] 49 U.S.C. §306(a)(1), 309(a)(1)

[3] 49 U.S.C. §303(a)(14), (15).

[4] 49 U.S.C. §310a(a) provides:

> To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by

(continued)

which is set out at the margin, makes clear and the cases have so held that temporary authorities are quite different, at least procedurally, from "certificates" and "permits."[5] To be specific, the standards for initially granting, the discretion of the ICC in issuing and the process for administrative review are all quite different with regard to temporary authorities.

Juxtaposed with the complex Federal regulatory scheme over motor carriers, was the established system within each State for motor carrier registration prior to use of their respective highways. These registration requirements required truckers *inter alia* to register their ICC issued operating authorities (both temporary and permanent), to register and identify their vehicles and to register evidence of insurance and designation of local agent for service of process.

Due to the variety of registration requirements, the burden on interstate motor carriers attempting to comply, and the growth of illegal trucking, a movement arose for standardization of these state registration requirements. In 1965 Congress amended the Interstate Commerce Act to include 49 U.S.C. §302(b)(2).[6] The amendment set forth a

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[4] (continued)

> motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify; but ftr not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

[5] H.C.&D. Moving and Storage Company v. United States, 317 F.Supp. 881 at 883 (D. Hawaii 1970); Land-Air Delivery, Inc. v. United States, 371 F.Supp. 217 (D. Kan. 1973).

[6] 49 U.S.C. §302(b)(2) provides in pertinent part:

> The requirement by a State that any motor carrier operating in interstate or foreign commerce within the bor-

(continued)

unique procedure for promulgating uniform standards whereby the standards were to be adopted first by the "national organization of the State Commissioners" (NARUC), certified by NARUC to the ICC, and then promulgated by the ICC. The statute declared that state

[6] (continued)

> ders of that State register its certificate of public convenience and necessity or permit issued by the Commission shall not constitute an undue burden on interstate commerce provided that such registration is accomplished in accordance with standards, or amendments thereto, determined and officially certified to the Commission by the national organization of the State Commissions, as referred to in Section 305(f) of this title, and promulgated by the Commission. As so certified, such standards, or amendments thereto, shall be promulgated forthwith by the Commission and shall become effective five years from the date of such promulgation. As used in this paragraph, "standards or amendments thereto" shall mean specification of forms and procedures required to evidence the lawfulness of the interstate operations of a carrier within a State by (a) filing and maintaining current records of the certificates and permits issued by the Commission, (b) registering and identifying vehicles as operating under such certificates and permits, (c) filing and maintaining evidence of currently effective insurance or qualifications as a self-insurer under rules and regulations of the Commission, and (d) filing designations of local agents for service of process. Different standards may be determined and promulgated for each of the classes of carriers as differences in their operations may warrant. In determining or amending such standards, the national organization of the State commissions shall consult with the Commission and with representatives of motor carriers subject to State registration requirements. To the extent that any State requirements for registration of motor carrier certificates or permits issued by the Commission imposed obligations which are in excess of the standards or amendments thereto promulgated under this paragraph, such excessive requirements shall, on the effective date of such standards, constitute an undue burden on interstate commerce . . .

registration requirements which meet the standardized requirements are not an undue burden on interstate commerce. The thinking at the time was that uniform standards would make registration significantly easier for the motor carriers while facilitating enforcement of the requirements in each State.[7]

In 1966 NARUC adopted initial standards which were certified to the ICC and subsequently promulgated. These standards, codified at 49 C.F.R. Part 1023, set forth uniform registration requirements for motor carriers including registration of both temporary and permanent authorities. Specifically, one of the standards provides that a temporary authority of thirty (30) days or less duration need not be registered in a State if the motor carrier has already registered a previously issued authority and notifies the State of its newly issued ICC temporary authority.[8]

This provision which exempts certain carriers operating with temporary authorities from state registration is at the core of this dispute. In August, 1973, the ICC issued notice of proposed rulemaking to amend this provision, to provide an extension of the exemption to carriers with temporary authorities of ninety (90) days duration.[9] In addition, the amendment provides a simplified notification procedure for those carriers who have no previous authority already registered in a State, permitting them to notify the State personally without ICC verification. The ICC adopted the proposed rule[10] despite NARUC's contention that this amendment to the standards could not be promulgated through rulemaking, but must be adopted first by NARUC,

[7] H.R. Rep. No. 253, 89th Cong., 1st Sess., (1965), at pg. 4, 1965 U.S. Code Cong. & Adm. News, at p. 2923.

[8] 49 C.F.R. §1023.11.

[9] 49 C.F.R. §1131.7.

[10] 119 M.C.C. 327.

then certified to the ICC, as provided by 49 U.S.C. §302(b)(2) and as followed on all previous occasions when the uniform standards were issued and amended.

It is this act of the Commission which is currently before the Court for review. NARUC contends that this regulation which amends the uniform standards should be set aside because it was promulgated in an illegal manner. Plaintiff argues that when Congress amended the Interstate Commerce Act to include a unique procedure for promulgation of uniform standards for state registration requirements through initial adoption by the NARUC and subsequent certification to the ICC, Congress intended that NARUC would have exclusive jurisdiction over the standards for registration of both temporary and permanent authorities. Petitioners recite legislative history, contemporaneous construction by the Commission and logic as supportive of their position that the terms "certificates" and "permits" should be interpreted to include "temporary authorities". In the alternative, NARUC argues that the regulation is arbitrary and capricious, lacking adequate support in the record.

In response, the Commission asserts that the Congressionally mandated registration procedure prescribed in 49 U.S.C. §302(b)(2) applies only to "certificates" and "permits" as evidenced by Congress' selection of those terms in the statute, and does not extend to registration of temporary authorities issued under 49 U.S.C. §310a(a). It is the Commission's position that Congress granted it broad authority to administer the area of temporary operating authorities to meet immediate transportation needs. The Commission argues that where state registration requirements interfere with that sphere of authority, the Commission has the duty to prescribe reasonable rules regulating the "continuous and adequate service" they are required to protect.[11]

[11] 49 U.S.C. §304(a)(1) and (6).

Looking at the face of the statute, the Court concludes that the Commission's position is the correct one. The statutory provision which withdraws from the ICC authority over regulating state registration requirements is clear and unambiguous in its use of the precise terms of "certificates" and "permits." 49 U.S.C. 310a(a) which grants the Commission authority to issue temporary authorities was enacted in 1938, and motor carriers operating under temporary authorities occupied a significant and well-known position in the industry at the time this provision for uniform standards was enacted. Had Congress intended to include temporary authorities in this statutory scheme for standardization, it would have chosen words to so indicate.

Plaintiff refers to substantial portions of the legislative history to support the argument that Congress intended to include both temporary and permanent authorities in its grant of jurisdiction over uniform standards to NARUC, despite the use of more restrictive terms "certificate" and "permits." It is a well recognized principle of statutory construction, however, that legislative history should be used to resolve ambiguities, and not to create them.[12] For this reason, the Court is of the opinion that any exhaustive discussion of or indeed resort to the legislative history to resolve the issue presented would be unnecessary and improper in this case.

Nevertheless, the Court has reviewed the legislative history and fails to find persuasive evidence that Congress intended other than what it stated and made clear in wording this statute. Therefore, it is the decision of this Court that 49 U.S.C. §302(b)(2) which grants to a national organization of State Commissioners jurisdiction to adopt

[12] Wisconsin R.R. Comm. v. C.B. & Q.R.R. Co., 257 U.S. 563, at 589 (1922); Penn. R.R. Co. v. International Coal Co., 230 U.S. 184, at 199 (1913).

uniform registration requirements does not encompass the area of temporary authorities.

The Court having concluded that the Commission has authority to amend the registration requirements pertaining to temporary authorities, the only contention left for resolution is whether the record before the Court supports the Commission's decision to adopt the proposed revision of the requirements.[13] The Court's review function is quite circumscribed in cases of this nature. The proper standard for judicial review of this regulation is whether the

[13] Prior to the present amendment the manner of such registration was prescribed in 49 C.F.R. §1023.11, which provided that temporary authority of 30 days or less need not be registered with the State if the carrier has:

> (a) Registered its other authority and identified its vehicles or driveaway operation under the provisions of these standards; and (b) furnished to the State commission a telegram or other written communication describing such emergency or temporary operating authority and stating that operation thereunder shall be in full accord with the requirements of these standards.

The present rule modified the above conditions as follows:

> Notwithstanding the provisions of 49 C.F.R. 1023.11, a motor carrier shall not be required to file with a State commission an emergency or temporary operating authority having a duration of 90 consecutive days or less if such carrier has: (a) registered its other authority granted by the Interstate Commerce Commission authorizing operation in or through the involved State (a carrier possessing no other such authority may qualify for this exception upon compliance only with condition (b) below) and identified its vehicles or drive-away operation under the provisions of those standards set forth at 40 C.F.R. 1023.31-1023.42, both inclusive; and (b) furnished to the State commission a telegram or other written communication from the motor carrier describing such emergency or temporary operating authority and stating that operation thereunder shall be in full accord with the requirements of those standards set forth at 49 C.F.R. 1023.1 *et seq.*

Commission's conclusions are rationally supported in the record.[14]

Applying this standard to the record currently before us, the Court concludes that the decision must be sustained.

The principal issue raised by petitioner as to the absence of record support is that the Commission's assertion in its notice of the proposed change that it had come to its attention that certain state requirements concerning the registration of temporary authorities were generating delays for urgently needed services is unsupported by the record. Petitioner emphasizes,

> In any event, how the Commission determined that the process "usually takes between 10 to 14 days" was, and remains to this day, a total mystery.[15]

The validity of the action of the Commission would not seem to depend upon proof of finding of any specified number of days of delay. NARUC does not contend that no delays are caused by the state registration requirements, or that the Commission's concern to prevent delay is without foundation. NARUC does question the position of the Commission that the delays are due to state requirements. It points to the likelihood that in the end such delays as might otherwise be due to state requirements, if considered alone, are offset by concurrent delays by the Commission itself after the temporary authority is granted. While the Commission may have dealt more explicitly with the matter of length of delay, there is ample evidence in the record, from the comments submitted by several States, of variations in notification procedures previously required by

[14] United States v. Allegheny-Ludlum Steel, 406 U.S. 742 at 749 (1972); California Citizen's Band Assn. v. United States, 375 F.2d 43, 53-54 (9th Cir. 1967), cert. denied, 389 U.S. 844 (1967).

[15] Petitioner's Reply Br., p. 30.

the States, and this is intertwined with the general problem of delay.[16] Moreover, from the record as a whole it appears that the objective of achieving more expeditious service by the amended rule is not without rational support. In so concluding weight is given, as it must be, to the judgment of the Commission as to the need for simplification and more uniformity of the procedures, so as to enable the carrier more readily to begin operations once the Commission has authorized services of immediate and urgent need.

It is noted that the action of the Commission has been suspended in effectiveness awaiting judicial review. During this period since December, 1973, much experience no doubt has accumulated. The Commission may wish to consider the subject in light of such experience; but the Court is not justified in holding the action taken to be invalid as without rational support. Therefore, the Commission's decision in *State Registration of Emergency Temporary and Temporary Authority*, Ex Parte No. MC-67, 119 M.C.C. 327, is upheld and this case is dismissed.

s/ Charles Fahy
CHARLES FAHY
UNITED STATES SENIOR CIRCUIT JUDGE

s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
UNITED STATES DISTRICT JUDGE

s/ Charles R. Richey
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

DATED: June 9, 1975

[16] The Commission states:

> Certain states have apparently refused to accept telegrams from the carriers and insist that the Commission must originate the communication. This also reduces the time period of a temporary authority and prohibits a carrier from providing a service urgently required.

* * * * * *

APPENDIX B *Served January 18, 1974*

M-12506

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. MC-67 (SUB-NO. 2)

STATE REGISTRATION OF EMERGENCY TEMPORARY AND TEMPORARY AUTHORITY

Decided December 17, 1973

Upon investigation and consideration of views, arguments, and representations of the parties, the adoption of certain additional rules designed to facilitate State registration of motor carrier temporary authorities found to be in the public interest. Appropriate order entered.

William J. Monhein for Continental Contract Carrier Corp.

Fred G. Favor for the Local and Short Haul Carriers National Conference.

Sumner J. Katz and *Paul Rodgers* for National Association of Regulatory Utility Commissioners.

David J. Allen, Louis G. Boedecker, Joseph L. Cisco, Charles H. Dickman, Lawrence Q. Garcia, W. W. Hill, Jr., John P. Mathis, Robert E. McTaggart, Winslow E. Melvin, William B. Powers, Dennis L. Runyan, J. Calvin Simpson, Ernest C. Steel, and *Walter Wendlandt* for certain State regulatory Commissions.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Section 210a(a) of the Interstate Commerce Act, as amended [49 U.S.C. 310a(a)], empowers this Commission, in its discretion and without hearings or other proceedings, to grant temporary authority to enable the provision of service by a common or contract carrier by motor vehicle in interstate or foreign commerce for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need. Regulations governing the issuance of temporary authorities can be found in Part 1131 of Title 49 of the Code of Federal Regulations. By Notice of Proposed Rulemaking and Order initiating this proceeding entered August 30, 1973, we noted that it has come to our attention that certain State requirements concerning the registration of temporary authorities issued by us are generating

delays in the provision of motor carrier services for which this Commission has found an immediate and urgent need: that such delay-causing State regulations may be a burden upon interstate commerce and may prohibit the shipping and traveling public from receiving service they immediately and urgently require: and that such regulations do not appear to be in the public interest and should not be allowed to operate to the detriment of the public and in conflict with the basic principles underlying Federal economic regulation of the interstate motor carrier industry.

By way of background, the Notice and Order further recited that the second proviso of section 1023.11[1] provides that a motor carrier is not to be required to register with any State emergency or temporary authority which is not to remain in effect in excess of 30 days provided: (a) the carrier has previously registered its other authority with the State and identified its vehicles as otherwise required by part 1023, and (b) furnished to the State a telegram or other written communication describing the emergency or temporary operating authority and stating that the operations will be conducted in full conformity with the requirements for uniform registration; and that this regulation, which had then been in effect for 18 months, has generated a number of problems. These were described as follows:

> First, carriers are not required to register emergency temporary authority which is not to remain in effect for over 30 days if they meet the conditions in (a) and (b) above. Because emergency temporary authorities are often extended for 60 and 90 days, the 30-day limitation in section 1023.11 tends to nullify the intent of the regulation and delay the rendition of urgently needed motor carrier service.
>
> Condition (a) above permits carriers to take advantage of this section if they have previously registered their other interstate authority with the State. A carrier which receives emergency temporary authority from this Commission and has no previously registered interstate authority (because it has no other authority from this Commission) is being required to file with the States copies of its emergency temporary authority in compliance with 49 CFR 1023.13. This process usually takes between 10 and 14 days. The carrier cannot operate during this period although it has shown an urgent need for its service. Its 30-day emergency authority is reduced by 10 to 14 days in such instances.
>
> Condition (b) requires that a telegram or letter be furnished to States describing the authority. Certain States have apparently refused to accept telegrams from the carriers and insist that this Commission must originate the communication. This also reduces

[1] Part 1023 of Title 49 of the Code of Federal Regulations, promulgated by this Commission following the procedures prescribed in section 202(b)(2) of the Interstate Commerce Act [49 U.S.C. 302(b)(2)], as amended by Public Law 89-170, 79 Stat. 648 approved September 6, 1965, sets forth Standards for Registration of Certificates and permits with States. The pertinent statutory provision is set forth in full in appendix A hereto.

> the time period of a temporary authority and prohibits a carrier from providing a service urgently required.

Based on the foregoing, it was proposed that 49 CFR 1131 be amended by the addition of the new section set forth in appendix B to this report. The statutory authority cited in support of this action was part II of the Interstate Commerce Act, including particularly sections 210a(a), 204(a)(1) and (6), and 202(b) thereof [49 U.S.C. 310a(a), 304(a)(1) and (6), and 302 (b)].

The above-described Notice of Proposed Rulemaking and Order was published in the Federal Register on September 5, 1973 (38 F.R. 23979). The Notice stated that no oral hearings were contemplated, and interested persons were invited to file representations supporting or opposing the proposed action. Representations have been received from Continental Contract Carrier Corp., the National Association of Regulatory Utility Commissioners (NARUC), the Public Service Commission of Indiana, the Department of Public Service Regulation of the Public Service Commission of the State of Montana, the New Hampshire Public Utilities Commission, the Railroad Commission of Texas, and the People of the State of California and the Public Utilities Commission of the State of California.[2]

THE REPRESENTATIONS

Continental contends that various archaic State regulations regarding the registration of temporary authorities represent an undue burden on interstate commerce. It asserts that this Commission must stringently enforce any regulation promulgated herein or the States will not comply. As specific examples of State disregard for the applicable rules, Continental notes that while 49 CFR 1023.13 states that the fee for registering *additional* operating authority with the States must not exceed $10 an application, Indiana and Florida charge $25, Michigan charges $20, and Arkansas demands $50 per application.

NARUC, which in 1966 determined the original standards set forth in 49 CFR 1023 and certified said standards to this Commission for promulgation, asserts that it has not officially certified to this Commission the modification proposed and that such certification is required by section 202(b)(2) of the Interstate

[2] The late-tendered representation on behalf of The Local and Short Haul Carriers National Conference, expressing the belief that the proposed rules will eliminate paperwork and contribute substantially toward eliminating freight delays, has been accepted.

Commerce Act. It avers that several amendments have been made to the initial standards in accordance with the congressionally mandated procedure prescribed in section 202(b)(2) of the statute, and it cites quotations from the legislative history of the said section to the effect that NARUC is intended to have the "primary and exclusive right to determine the standards." It claims that a Commission conclusion that the present requirements of 49 CFR 1023.11 constitute a burden upon interstate commerce is directly contrary to the congressional determination on the subject; that because section 202(b)(2) of the act is the latest provision enacted, it supersedes such general authorities cited in the instituting Notice and Order as sections 204(a)(1) and (6) and 210a(a) of the statute. It asserts that this Commission has not acted in a cooperative manner in this proceeding because it failed to consult with NARUC; and it concludes that this Commission does not have the power to promulgate the proposed rule.

The Public Service Commission of Indiana objects to our proceeding in this case without an opportunity for oral hearing. It states that the problems that have arisen in relation to 49 CFR 1023.11 are not the fault of Indiana, but are the responsibility of this Commission which requires more than 30 days to issue an emergency temporary authority order when Indiana issues similar intrastate authority within 7 days. It objects to the proposal that a carrier possessing no other authority may qualify for the involved exception upon compliance with only condition (b) (see appendix B) assertedly because (1) it would allow carriers to traverse Indiana with no insurance coverage or resident process agent on file with the State commission, (2) the State would not know if the carriers have this information on file with this Commission, (3) the State would not know if the insurance on file with this Commission was equal to Indiana's requirements, (4) the citizens of Indiana would not have this information readily available, and (5) it would discriminate against existing carriers which have already registered authority with Indiana.

The Montana PSC submits that it is unwise to require that a State rely on a self-serving document from a carrier that the carrier has the necessary emergency temporary authority to operate in that State. It avers that we should be willing to notify the carrier and each State board affected by telegram or other written communication that such carrier has the appropriate authority. It would be willing to accept the word of a carrier that it has appropriate authority for 30 days, if thereafter the proper State

authorities were notified by telegram or other written communication by this Commission that a carrier has been issued emergency temporary or temporary authority.

The Public Utilities Commission of New Hampshire informs us by letter that it requires the registration of motor carrier interstate certificates and permits. Because temporary authorities are not considered certificates or permits, it does not require registration of such authority. It urges, however, that we issue temporary authority only upon a clear showing of "urgent need" as required by statute. Finally, it contends that hundreds of new carriers receive authority each year and it fears this may have an adverse effect upon the quality of our air.

The Railroad Commission of Texas has also responded by letter. That commission requires all carriers to register emergency temporary authority by completing an application form, and paying a regular application fee ($10) plus an additional $25 fee for emergency handling. It usually processes such applications in 1 to 3 hours (never over 24 hours), but first it requires some notification, such as a telegram from a district office of this Commission. If a carrier does not have prior authority from this Commission, the procedure is delayed so that the State can be assured that the carrier is properly insured. Texas opposes the proposed rule insofar as it would permit carriers on the road without evidence of insurance (such as a cab card). Police assertedly could not enforce insurance provisions of State statutes because drivers would claim they are operating under temporary authority from this Commission and the officer could not readily verify this fact. Texas contends that if an emergency exists, it is entitled to notification from us and not the carrier.

The California PUC has no objection to timely communication from the carrier, but states that problems in that State are caused by not receiving *any* information from carriers. It suggests that for State enforcement purposes, the telegram sent by a carrier should contain a designation of a process agent as well as its authority and vehicle identification. California would have previously unregistered carriers carry in each vehicle some form of identification (like a cab card) relating to its authority. It also asserts that formal compliance with State registration provisions as soon as possible should be required.

Discussion and Conclusions

Section 202(b)(2) of the Interstate Commerce Act, reproduced in appendix A hereto, permits a State to require motor carriers

operating in interstate or foreign commerce within the borders of that State to register their certificates of public convenience and necessity or permit issued by this Commission. Section 210a(a) of the statute allows this Commission, in its discretion, to grant temporary authority to enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need. Section 210a(a) of the act does not contemplate the issuance of a certificate of public convenience and necessity or a permit by this Commission, and temporary operating authorities are neither a certificate nor a permit. Therefore, registration requirements promulgated pursuant to section 202(b)(2) are not applicable to temporary or emergency temporary authority and a finding that the application of temporary authorization of existing regulations codified at 49 CFR 1023 are an undue burden on interstate commerce is not, as NARUC represents, statutorily precluded. The State of New Hampshire seemingly follows this same logic in that it does not require registration of temporary authorities because such authorizations are not certificates or permits.

Assuming this were not the case, and we do not think such an assumption legally supportable, however, we believe that the final sentence of section 202(b)(2), as reproduced in appendix A hereto, permits us to interpret regulations promulgated pursuant to this subsection which may conflict with and defeat the purposes of other provisions of the act and other reasonable regulations adopted by this Commission in furtherance of our regulatory responsibilities. The delays caused by the current interpretations by the States of the involved regulation do not allow carriers to provide the immediate and urgent service found to be required by the shipping public. Such delays nullify, in part, the fundamental intent underlying section 210a(a) and the State commission interpretations generating them must be considered an undue burden on interstate commerce and unreasonable. The last sentence of section 202(b)(2) recognizes a means of permitting us to prevent such abuses in the public interest without maintaining such a burden for over 5 years as might otherwise be required. This last sentence of section 202(b)(2) states generally that nothing in this paragraph shall be construed to deprive this Commission, when there is a reasonable question of interpretation or construction, of its jurisdiction to interpret or construe rules or regulations issued by this Commission. There is certainly a reasonable interpretive problem in this proceeding involving the interpretation not only of the statute itself but also of a Commission regulation promulgated thereunder.

The framers of section 202(b)(2) of the act sought to achieve cooperative enforcement of this Commission's regulations by the various State and Federal agencies responsible for such enforcement. NARUC was delegated to design regulations to this end. The last sentence of section 202(b)(2), however, makes it clear that NARUC's responsibility could neither be extended to infringe upon the ability of this Commission to regulate surface transportation in the public interest, nor interpreted in such a manner as to conflict with existing regulations of this Commission. The existing cooperative enforcement regulations invalidate, in part, 49 CFR 1131, a regulation necessary to the proper administration of section 210a(a) of the act; and to the extent of this conflict, we are convinced of our jurisdiction to take appropriate action in this proceeding.

Though not a single shipper formally commented in this proceeding, it is they who are being injured by the existing situation. They are the persons requiring "immediate and urgent" service which is not available from existing carriers, and it is they who are being told that this Commission has found a statutory need for such service, but that State registration procedures are delaying the commencement of the required service. As a consequence, the shipper cannot get its goods to market, on a timely basis, the retailers' supplies dwindle, and consumer prices rise. We seek, by our action herein which in no way oversteps the bounds of statutory authority reserved to NARUC, to eliminate this inflationary cycle.

We are disappointed in the motor carrier participation (only one carrier) in this proceeding. Informally, carriers have complained vehemently about this problem. Formally, they expect the "other guy" or this Commission to do the job. New Hampshire urges that this Commission carefully scrutinize motor carrier temporary authority applications to ascertain that an immediate and urgent need does, in fact, exist. All citizens can be assured that we do not take our statutory responsibilities lightly in this regard, and carriers are required to meet this statutory prerequisite before receiving any authority from us. See *Motor Carrier Temporary Authority*, 118 M.C.C. 444 (1973).

The States participating herein generally express their belief that they will not have sufficient information to determine whether a carrier has appropriate authority to operate in a State, is properly insured, and has an agent for process in the State. This information will be provided to the States by the carrier. Some States assert that this is merely a self-serving declaration by a carrier and not reliable.

We disagree. States can impose severe penalties on carriers tendering false information. If a State wishes to check any portion of a statement's veracity, it may call this Commission or our nearest field representative. Such information is as close as the State agency's telephone. A police officer on the road can call in and have such information verified at the State commission or, if thought necessary, either at the local Commission field office or in Washington, usually in minutes. If the officer should still be in doubt, he likely can consider the issuance of a conditional ticket, requiring the carrier to show proof of its authority at a later date.

OTHER MATTERS

It appears that certain States maintain regulations in violation of the cooperative enforcement rules certified by NARUC and approved by us. For example, several States apparently require registration fees in excess of the maximum fee set in 49 CFR 1023.13. These State regulatory agencies should bring their regulations into strict conformity with the cooperative enforcement rules promulgated pursuant to the statutory procedures. We are certain that their cooperation and that of their national organization (NARUC) in this regard will be forthcoming.

The New Hamsphire PUC fears that if we ease entry into the motor carrier field, it will put added trucks onto the road and increase air pollution. As we stated above, carriers must meet their statutory burdens of proof before any authority will be granted to them. In view of this, there is no evidence of any cause-and-effect relationship between motor carrier licensing and the quality of our human environment within the meaning of the National Environmental Policy Act of 1969. Compare *IML Freight, Inc., Ext.—Containerized Freight*, 118 M.C.C. 31 (1973).

Finally, the Indiana PSC objects to our processing this proceeding without oral hearing. There are no material issues of fact in dispute in this proceeding and the Indiana Commission has not raised any proper basis for granting oral hearing and has not shown why it could not clarify the issues herein in its representation. There is presently sufficient information in the record on which to base a determination and no oral hearing is warranted. For other rulemaking proceedings handled in this manner, see *Practices of Motor Common Carriers of Household Goods*, 118 M.C.C. 178 (1973), and *Motor Carrier Temporary Authority, supra*.

In summary, we have attempted to indicate our present conclusions as to the problems of State and Federal cooperation involving motor carrier temporary authorities issued by this Commission, and to declare the considerations which have led us to these judgments. Our goal, succinctly stated, is to achieve impartial, sound, and realistic regulation consistent with the national transportation policy declared by the Congress[3] and the public interest. We are convinced that the best way in which to accomplish these ends is through the issuance of this report and the adoption of the regulation set forth in appendix B hereto. We offer the State regulatory agencies our fullest cooperation in assisting them to adapt their operations to the regulation promulgated in this proceeding.

FINDINGS

We find that Part 1131 of Chapter X of Title 49 of the Code of Federal Regulations should be amended by adding section 1131.7 thereto as set forth in appendix B to this report; that such rules are reasonable and necessary to the effective enforcement of the provisions of part II of the Interstate Commerce Act, as amended, and that such rules are otherwise lawful, and to the extent found in this report are required by the present and future public convenience and necessity; and that this decision is not a major Federal action having a significant effect upon the quality of our human environment.

An appropriate order will be entered.

[3] 49 U.S.C. preceding section 1.

APPENDIX A

Section 202(b)(2) of the Interstate Commerce Act, as amended, reads as follows:

(2) The requirement by a State that any motor carrier operating in interstate or foreign commerce within the borders of that State register its certificate of public convenience and necessity or permit issued by the Commission shall not constitute an undue burden on interstate commerce provided that such registration is accomplished in accordance with standards, or amendments thereto, determined and officially certified to the Commission by the national organization of the State commissions, as referred to in section 205(f) of this Act, and promulgated by the Commission. As so certified, such standards, or amendments thereto, shall be promulgated forthwith by the Commission and shall become effective five years from the date of such promulgation. As used in this paragraph, "standards or amendments thereto" shall mean specification of forms and procedures required to evidence the lawfulness of interstate operations of a carrier within a State by (a) filing and maintaining current records of the certificates and permits issued by the Commission, (b) registering and identifying vehicles as operating under such certificates and permits, (c) filing and maintaining evidence of currently effective insurance or qualifications as a self-insurer under rules and regulations of the Commission, and (d) filing designations of local agents for service of process. Different standards may be determined and promulgated for each of the classes of carriers as differences in their operations may warrant. In determining or amending such standards, the national organization of the State commissions shall consult with the Commission and with representatives of motor carriers subject to State registration requirements. To the extent that any State requirements for registration of motor carrier certificates or permits issued by the Commission imposed obligations which are in excess of the standards or amendments thereto promulgated under this paragraph, such excessive requirements shall, on the effective date of such standards, constitute an undue burden on interstate commerce. If the national organization of the State commissions fails to determine and certify to the Commission such standards within eighteen months from the effective date of the paragraph, or if that organization at any time determines to withdraw in their entirety standards previously determined or promulgated, it shall be the duty of the Commission, within one year thereafter, to devise and promulgate such standards, and to review from time to time the standards so established and make such amendments thereto as it may deem necessary, in accordance with the foregoing requirements of this paragraph. Nothing in this paragraph shall be construed to deprive the Commission, when there is a reasonable question of interpretation or construction, of its jurisdiction to interpret or construe certificates of public convenience and necessity, permits, or rules and regulations issued by the Commission, nor to authorize promulgation of standards in conflict with any rule or regulation of the Commission.

APPENDIX B

The rule

49 CFR 1131.7 *State registration of temporary authorities.*

Notwithstanding the provisions of 49 CFR 1023.11, a motor carrier shall not be required to file with a State commission an emergency or temporary operating

authority having a duration of 90 consecutive days or less if such carrier has: (a) registered its other authority granted by the Interstate Commerce Commission authorizing operation in or through the involved State (a carrier possessing no other such authority may qualify for this exception upon compliance only with condition (b) below) and identified its vehicles or driveaway operation under the provisions of those standards set forth at 40 CFR 1023.31-1023.42, both inclusive; and (b) furnished to the State commission a telegram or other written communication from the motor carrier describing such emergency or temporary operating authority and stating that operation thereunder shall be in full accord with the requirements of those standards set forth at 49 CFR 1023.1 *et seq.*

ORDER

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER B - PRACTICE AND PROCEDURE
PART 1341 - TEMPORARY AUTHORITY APPLICATIONS UNDER SECTION 210a(a) OF THE INTERSTATE COMMERCE ACT

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 17th day of December 1973.

Ex Parte No. MC-67 (Sub-No. 2)

STATE REGISTRATION OF EMERGENCY TEMPORARY AND TEMPORARY AUTHORITY

It appearing, That this Commission on its own motion issued a notice of proposed rulemaking and order, dated August 30, 1973 [published in the Federal Register on September 5, 1973 (38 F.R. 23979)], which invited comments and representations from any interested persons;

It further appearing, That investigation of the matters and things involved in this proceeding having been made, and the Commission, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof;

It is ordered, That Part 1131 of Chapter X of Title 49 of the Code of Federal Regulations be, and it is hereby, amended by adding section 1131.7 as set forth in appendix B to the said report. (49 Stat. 560, 561, 52 Stat. 1237, 1238, 80 Stat. 378; 49 U.S.C. 304 and 310a; and 5 U.S.C. 553, 558.)

It is further ordered, That this order shall become effective on March 1, 1974, and shall remain in effect until modified or revoked in whole or in part by further order of this Commission.

And it is further ordered, That notice of this order shall be given to the general public by depositing a copy thereof in the Office of

the Secretary of the Commission at Washington, D.C., and by filing a copy with the Director, Office of the Federal Register.

By the Commission.

ROBERT L. OSWALD,

(SEAL) Secretary.

APPENDIX C

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

National Association of
Regulatory Utility Commissioners,
Plaintiff,

vs. **Civil Action No. 74-790**

United States of America, *et al.*,
Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the National Association of Regulatory Utility Commissioners (NARUC), plaintiff above named, hereby appeals to the Supreme Court of the United States from the final order dismissing the complaint, entered in this action on June 9, 1975.

This appeal is taken pursuant to 28 U.S.C., §1253, and 28 U.S.C., §2321n. [U.S.C.A. (Feb., 1975 Supp. to Pocket Parts), 88 Stat. 1917, §10 of P.L. 93-584].

s/ Paul Rodgers
PAUL RODGERS
General Counsel

s/ Sumner J. Katz
SUMNER J. KATZ
Assistant General Counsel

National Association of
Regulatory Utility Commissioners

1102 ICC Building
Post Office Box 684
Washington, D.C. 20044

August 4, 1975

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

National Association of
Regulatory Utility Commissioners,
Plaintiff,

vs. **Civil Action No. 74-790**

United States of America, *et al.*,
Defendants.

CERTIFICATE OF SERVICE

I, Sumner J. Katz, Assistant General Counsel for the National Association of Regulatory Utility Commissioners (NARUC), and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served copies of the foregoing Notice of Appeal to the Supreme Court of the United States by depositing same in the United States mail, first class postage prepaid, to the following:

1. Solicitor General
   Department of Justice
   Washington, D.C. 20530

2. Fritz R. Kahn
   General Counsel
   Hanford O'Hara
   Attorney
   Interstate Commerce Commission
   12th St. and Constitution Ave., N.W.
   Washington, D.C. 20423

3. Thomas E. Kauper
   Assistant Attorney General
   John H. D. Wigger
   Attorney
   Department of Justice
   Washington, D.C. 20530

4. Earl J. Silbert
United States Attorney
Washington, D.C. 20001

I further certify that all parties required to be served have been served.

This, the 4th day of August, 1975.

s/ Sumner J. Katz
SUMNER J. KATZ

APPENDIX D

STATUTES INVOLVED
THE INTERSTATE COMMERCE ACT

1. Section 202(b)(1) (49 U.S.C., §302(b)(1)):

> Nothing in this part, except as provided in section 226A, shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

2. Section 202(b)(2) (49 U.S.C., §302(b)(2)):

> The requirement by a State that any motor carrier operating in interstate or foreign commerce within the borders of that State register its certificate of public convenience and necessity or permit issued by the Commission shall not constitute an undue burden on interstate commerce provided that such registration is accomplished in accordance with standards, or amendments thereto, determined and officially certified to the Commission by the national organization of the State commissions, as referred to in section 205(f) of this Act, and promulgated by the Commission. As so certified, such standards, or amendments thereto, shall be promulgated forthwith by the Commission and shall become effective five years from the date of such promulgation,* *Provided,*

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* The proviso clause, to the first period after the word "Provided," was added by amendment adopted on October 28, 1974 (Sec. 14 of P.L. 93-496, 88 Stat. 1532).

That (1) any amendments of such standards, which are determined by the national organization of the State commissions and promulgated by the Commission prior to the initial effective date of such standards shall become effective on such initial effective date; and (2) after such standards become effective initially, any amendments of such standards, which are subsequently determined by the national organization of the State commissions, shall become effective at the time of promulgation or at such other time, subsequent to promulgation by the Commission, as may be determined by such organization. As used in this paragraph, "standards or amendments thereto" shall mean specification of forms and procedures required to evidence the lawfulness of interstate operations of a carrier within a State by (a) filing and maintaining current records of the certificates and permits issued by the Commission, (b) registering and identifying vehicles as operating under such certificates and permits, (c) filing and maintaining evidence of currently effective insurance or qualifications as a self-insurer under rules and regulations of the Commission, and (d) filing designations of local agents for service of process. Different standards may be determined and promulgated for each of the classes of carriers as differences in their operations may warrant. In determining or amending such standards, the national organization of the State commissions shall consult with the Commission and with representatives of motor carriers subject to State registration requirements. To the extent that any State requirements for registration of motor carrier certificates or permits issued by the Commission imposed obligations which are in excess

of the standards or amendments thereto promulgated under this paragraph, such excessive requirements shall, on the effective date of such standards, constitute an undue burden on interstate commerce. If the national organization of the State commissions fails to determine and certify to the Commission such standards within eighteen months from the effective date of the paragraph, or if that organization at any time determines to withdraw in their entirety standards previously determined or promulgated, it shall be the duty of the Commission, within one year thereafter, to devise and promulgate such standards, and to review from time to time the standards so established and make such amendments thereto as it may deem necessary, in accordance with the foregoing requirements of this paragraph. Nothing in this paragraph shall be construed to deprive the Commission, when there is a reasonable question of interpretation or construction, of its jurisdiction to interpret or construe certificates of public convenience and necessity, permits, or rules and regulations issued by the Commission, nor to authorize promulgation of standards in conflict with any rule or regulation of the Commission.

3. Section 205(f) (49 U.S.C., §305(f)):

(f) The Commission is authorized to confer with or to hold joint hearings with any authorities of any State in connection with any matter arising in any proceedings under this part. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities as fully as may be practicable, in the enforcement or administration of any provision of this part. In addition, the Commission is

authorized to make cooperative agreements with the various States to enforce the economic and safety laws and regulations of the various States and the United States concerning highway transportation. From any space in the Interstate Commerce Commission Building not required by the Commission, the Government authority controlling the allocation of space in public buildings shall assign for the use of the national organization of the State commissions and of their representatives suitable office space and facilities which shall be at all times available for the use of joint boards created under this part and for members and representatives of such boards cooperating with the Commission or with any other Federal commission or department under this or any other Act; and if there be no such suitable space in the Interstate Commerce Commission Building, the same shall be assigned in some other building in convenient proximity thereto.

4. Section 210a(a) (49 U.S.C., §310a(a)):

To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

ADMINISTRATIVE PROCEDURE ACT

1. 5 U.S.C., §706 (Scope of Review):

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error. (Pub. L.89-554, Sept. 6, 1966, 80 Stat. 393.)

APPENDIX E

REGULATIONS

1. 49 C.F.R., Part 1023:

§ 1023.1(d)

The words "motor carrier" shall mean a motor carrier of passengers or property holding operating authority issued by the Interstate Commerce Commission;

§ 1023.11 When registration required.

Whenever a State requires a motor carrier to file and maintain a current record of its authority issued by the Interstate Commerce Commission permitting operation within the borders of such State, such motor carrier shall not exercise such authority within the borders of such State unless and until there shall have been filed with and approved by the commission of such State an application for the registration of such authority as prescribed by the provisions of this subpart, and there shall have been a compliance with all other requirements of this subpart: *Provided, however,* That a motor carrier shall only be required to file with such State commission that portion of its authority permitting operation within the borders of such State; *And provided further,* That a motor carrier shall not be required to file with such State commission an emergency or temporary operating authority having a duration of 30 consecutive days or less if such carriers has: (a) Registered its other authority and identified its vehicles or driveaway operation under the provisions of these standards; and (b) furnished to the State commission a telegram or other written communication describing such emergency or

temporary operating authority and stating that operation thereunder shall be in full accord with the requirements of these standards.

§ 1023.13 Filing of application.

The application for the registration of such operating authority shall be filed in duplicate with the commission of such State. The original, to which the copy of the ICC operating authority shall be attached, shall be retained by the State commission. The other copy of the application or an acknowledgment shall be transmitted to the motor carrier when the application is approved by the State commission. The application shall be accompanied by the fee, if any, prescribed by the law of such State: *Provided, however,* That such fee shall not exceed $25 for an application filed by a motor carrier who has not previously filed a currently effective application for registration of ICC operating authority with the Commission of such State: *And provided further,* That such fee shall not exceed $10 for an application filed by a motor carrier who has previously filed a currently effective application for the registration of ICC operating authority with such Commission.

§ 1023.33 Form and execution of application for identification stamps or number.

The application for the issuance of such identification stamps or number shall be in the form set forth in Form B appended to this part and made a part of this section. The application shall be printed on a rectangular card or sheet of paper 11 inches in height and 8½ inches in width. The application shall be duly completed and executed by an official of the motor carrier, and shall be accompanied by the fee, if any, prescribed by the law of such State; provided, however, that such

fee shall not exceed $5 for the issuance of each such identification stamp; and provided further (when the State Commission assigns an identification number in lieu of issuing an identification stamp or stamps), that such fee shall not exceed $5 for each vehicle operated under the authority of the motor carrier identified in the cab card bearing such identification number. The prescription of the maximum fee of five dollars for the issuance of such identification stamp or number shall not preclude a State from imposing an additional fee in a reasonable amount to be paid to a State commission prior to the issuance of such stamp or number, if such additional fee shall be subject to exclusive use by the State commission and used by it solely for defraying the cost of the regulation of carriers by highway operating within the borders of such State and the enforcement of laws pertaining thereto. The state commission shall maintain adequate records to identify the receipt and disbursement of such funds collected pursuant to the provisions of this section.

2. 49 C.F.R., Sec. 1131.1(b)(1):

(b) *Definititions.* As used in this part, the following words and terms are construed as follows:

(1) *"Temporary authority"*. Limited-term motor carrier operating authority issued for periods up to 180 days (TA) pursuant to section 210a(a) of the Interstate Commerce Act to authorize transportation service for which there is an immediate and urgent need and which cannot be met by existing carrier service. This term includes "emergency temporary authority" issued

for periods of 30 days or less (ETA) to meet an immediate and urgent need for service due to emergencies, in which time or circumstances do not reasonably permit the filing and processing of an application for temporary authority (TA).

APPENDIX F

SECTION 1 OF COMMITTEE PRINT NO. 4 OF S. 2560, 87TH CONGRESS*

"That section 202(b) of the Interstate Commerce Act, as amended, is amended by striking the period at the end thereof and inserting in lieu thereof a semicolon and the following: 'but if any State requires any motor carrier subject to regulation by the Interstate Commerce Commission (other than regulation solely pursuant to the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment) operating in interstate or foreign commerce within the borders of that State —

(1) to register its certificate of public convenience and necessity or permit issued by the Interstate Commerce Commission;

(2) to identify its vehicles;

(3) to file policies of insurance, surety bonds, or qualifications as a self-insurer, or other securities or agreements for the protection of the public, or evidence thereof,

such State shall within five years after the enactment of this amendment to section 202(b) conform such requirements to the uniform standards which the Commission is hereby directed to promulgate, and such standards may differ for each of the classes of carriers as differences in their operations may warrant. In establishing such uniform standards the Commission shall give due regard to the needs of

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* Excerpted from *Hearings on S. 2560 and S. 2764 Before the Surface Transportation Subcomm. of the Senate Comm. on Commerce*, 87th Cong., 2d Sess., at 300-301 (1962).

the several States for information relating to the authority and operations of such motor carriers engaged in interstate and foreign commerce while protecting such carriers from a duty to file or otherwise comply with State requirements that, in the opinion of the Commission, might constitute an undue burden, financial, administrative, or otherwise, on the operations of such carriers. The Commission shall consult with the regulatory bodies of the several States and with representatives of such motor carriers subject to regulation under this part. In order to facilitate and effectuate the purposes of this paragraph the Commission shall review from time to time the uniform standards established pursuant to this paragraph and may make such modifications, changes, or amendments thereto as the Commission may deem necessary. Any such State requirements which, after the expiration of five years following enactment of this amendment to section 202(b) are not in conformity with the standards established by the Commission pursuant to this paragraph, shall be null and void.' "

PERMANENT AND TEMPORARY MOTOR CARRIER AUTHORITIES GRANTED BY THE ICC, FISCAL YEARS 1958 - 1965[1]

Fiscal Year	Temporary Authorities Granted	Permanent Authorities Granted[2]	Total Authorities Granted	Temporary Authorities as % of Total
1958	3,454	2,240	5,694	60.7%
1959	3,209	2,189	5,398	59.4%
1960	2,788	2,080	4,868	57.3%
1961	2,661	2,212	4,873	54.6%
1962	3,337	2,784	6,121	54.5%
1963	3,770	2,657	6,427	58.7%
1964	3,858	2,908	6,766	57.0%
1965	4,389	3,844	8,233	53.3%
TOTAL	27,466	20,914	48,380	56.8%

1. Sources of data are the ICC *Annual Reports*, Nos. 73 through 79, at the following pages: No. 73, at 56; No. 74, at 59; No. 75, at 66-68; No. 76, at 58-59; No. 77, at 44-46; No. 78, at 100-101; No. 79, at 102-103.

2. Includes permanent certificates, permits, and brokers' licenses.

Supreme Court, U. S.
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No. 75-520

In the Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, appellees move that the judgment of the district court be affirmed.

STATEMENT

For many years most States have imposed certain requirements on interstate motor carriers operating within their borders. States often require carriers to file copies of operating authorities issued by the

Interstate Commerce Commission, require vehicles to be registered with and by State authorities and identified in a certain manner, and require the filing of evidence of insurance and designations of local agents for service of process. Because these "registration" requirements vary from State to State, producing a burden on the carriers, efforts have been made in recent years to standardize them.

In 1965 Congress enacted Public Law 89-170 (79 Stat. 648), Section 2 of which is now Section 202 (b)(2) of the Interstate Commerce Act (49 U.S.C. 302(b)(2)). Under Section 202(b)(2) uniform standards for state registration of Commission-issued certificates of public convenience and necessity and permits are proposed by the "national organization of the State Commissions" (appellant in this case) and promulgated by the Commission. Any state requirements more burdensome than the uniform standards are deemed to constitute an "undue burden on interstate commerce."

Appellant proposed initial standards in 1966. The Commission promulgated the standards forthwith, to become effective five years thereafter, as the statute required. Amendments to the standards have been adopted under the same procedure. The standards are codified at 49 C.F.R. Part 1023.

In August 1973 the Commission issued a notice of proposed rulemaking (38 Fed. Reg. 23979) calling for the revision of state procedures for registration of temporary authorities. The Commission observed that various state practices were hampering the

rapid commencement of urgently required carrier services for which it had given temporary authority. The Commission discussed the existing requirements of 49 C.F.R. 1023.11 [1] and noted certain problems and inconsistencies in the States' interpretations and applications of those requirements. To meet these problems the Commission proposed the rule that has been challenged in this proceeding.

Under Part II of the Interstate Commerce Act (49 U.S.C. 301 *et seq.*), no for-hire motor carrier of passengers or property (with certain exceptions not relevant here) may conduct interstate operations without permission. The Commission is authorized to give permission in three ways: (1) in the case of a permanently licensed common carrier, by a "certificate of public convenience and necessity" issued under 49 U.S.C. 307; (2) in the case of a permanently licensed contract carrier, by a "permit" issued under 49 U.S.C. 309; and (3) in the case of a temporarily licensed carrier of either type, by a "temporary authority" issued under 49 U.S.C. 310a(a). See *United States* v. *Garner*, 134 F. Supp. 16, 19 (E.D. N.C.).

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[1] 49 C.F.R. 1023.11 provides that temporary authorities of 30 days or less duration need not be registered if the carrier involved:

> (a) Registered its other authority and identified its vehicles or driveaway operation under the provisions of these standards; and (b) furnished to the State commission a telegram or other written communication describing such emergency or temporary operating authority and stating that operation thereunder shall be in full accord with the requirements of these standards.

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Such temporary authorities are summarily issued to meet "immediate and urgent transportation needs." Cf. *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 538. Unlike certificates and permits, temporary authorities are not issued after full adjudicatory proceedings, but rather are granted after the summary standards of Section 310a(a) have been met—standards that allow issuance of such authority without hearings or other proceedings.

When it adopted the proposed rule (J.S. App. 11a-23a; 119 M.C.C. 327) the Commission concluded that the procedures described in Section 202(b)(2) apply only to "certificates of public convenience and necessity" and "permits," and do not apply to "temporary authorities" granted under Section 310(a) of the Interstate Commerce Act (J.S. App. 16a). The Commission also discussed at some length the need for the new rule. It observed that state registration procedures and delays have been a frequent cause of informal carrier complaints and that there is a need for consistency in the implementation of newly-granted temporary authorities (J.S. App. 17a). Finally, the Commission noted that many States appear to maintain regulations and practices in violation of the uniform standards of Part 1023. The Commission cautioned against the continuation of such practices and requested the cooperation of the state commissions in eliminating them (J.S. App. 18a).

On review, the three-judge district court unanimously sustained the Commission's decision (J.S. App. 1a-10a; 397 F. Supp. 591), holding that "the

Commission's position is the correct one" because Section 202(b)(2) is "clear and unambiguous in its use of the precise terms of 'certificates' and 'permits'" (J.S. App. 7a). Upon reviewing the legislative history of the Section, the court found no "persuasive evidence that Congress intended other than what is stated and made clear in wording this statute" (*ibid.*). The district court also held that the Commission's action was supported by the record; accordingly, it upheld the Commission and dismissed the complaint.

ARGUMENT

The regulations at issue in this case were promulgated by the Commission pursuant to its powers under Section 310a(a) of the Interstate Commerce Act. The Commission determined, in effect, that because compliance with the many and complicated state registration requirements could be quite difficult and time-consuming, those requirements were interfering with the Commission's ability to issue short-term temporary authorities. The more complex and time-consuming the state requirements, the less effective the Commission's temporary authorities will be. The Commission therefore preempted state registration requirements, to the extent those requirements applied to temporary authorities of less than 90 days' duration.

1. The foundation of appellant's arguments is that the Commission's regulations cannot preempt state requirements unless Congress has expressly conferred

upon the Commission the power to issue regulations with a preemptive effect. This proposition is incorrect. This Court has held that federal regulations, authorized by law, preempt conflicting state law and regulations. *Free* v. *Bland*, 369 U.S. 663. There need not be a separate congressional grant of a "power to preempt." The power to issue licenses to engage in interstate commerce necessarily includes the power to supersede state regulations and laws that may frustrate or impede the exercise of rights conferred by the federal license. *Shreveport Rate Cases*, 234 U.S. 342. The purpose of Section 310a(a) was "to provide the Commission with a swift and procedurally simple ability to respond to urgent transportation needs." *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 539. The inconvenience and delay caused by state registration procedures regarding temporary authorities are inconsistent with this mandate, and the Commission is empowered to displace them.

The cases relied upon by appellant to support its assertion that preemption is not favored (J.S. 10-12, 21-24) deal with quite different matters. Some of the cases (see, *e.g.*, *Fry Roofing Co.* v. *Wood*, 344 U.S. 157) deal with the question whether state regulation of commerce is preempted when Congress has passed no pertinent law or when a federal agency, although authorized to act, has elected not to do so. In other words, these cases deal with preemption because of the nature of the subject matter, even when the federal government has declined to exercise its

authority. This is not such a case—here Congress and the Commission have exercised their authority, and appellant attacks the validity of that exercise. Other of the cases (see, *e.g.*, *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U.S. 349) deal with the question whether Congress has authorized an administrative agency to regulate *intra*state commerce. Again, this is not such a case—here the Commission's regulation pertains only to temporary authority to engage in interstate motor transportation, and the Commission's power to bestow such authority is clearly conferred by Section 310a(a).

2. We submit, therefore, that the Commission's regulations preempt inconsistent state registration requirements unless Section 202(b)(2) limits the Commission's power in this regard. Although appellant argues vigorously that, under Section 202(b)(2), only it can propose new regulations with respect to state registration requirements, appellant's argument is not supported by the statutory language. Section 202(b)(2) gives appellant the power to initiate regulation of state registration requirements for "certificates of public convenience and necessity" and "permits." The Commission retains the power to initiate regulation of state requirements concerning temporary authorities.

The terms "certificate of public convenience and necessity" and "permit," each of which appears five times in Section 202(b)(2), have definite meanings —both terms are defined in the Act in specific ways. See page 3, *supra*. Both denote *permanent* oper-

ating authority.[2] The Commission's temporary authority regulations, in effect since 1965, also recognize that a temporary authority is neither a certificate nor a permit.[3] See also *United States* v. *Garner*, 134 F. Supp. 16, 19 (E.D. N.C.).

Appellant's assertion that, for purposes of Section 202(b)(2), the terms "certificate" and "permit" must be construed to include temporary authorities is supported only by a contention that Congress did not clearly demonstrate an intention to exclude temporary authorities from the scope of the Section. But the terms of the statute use highly specific and time-tested words of art and are not contradicted by the legislative history; as the district court observed (J.S. App. 7a), there is no "persuasive evidence that Congress intended other than what it stated and made clear in wording this statute." Appellant should seek relief from Congress if it believes that it, rather than the Commission, should have the power to

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[2] Section 206(a)(1) (49 U.S.C. 306(a)(1)) states that no common carrier may operate without a certificate "[e]xcept as otherwise provided in this section and in section [310a]," thereby indicating that a "temporary authority" is not a "certificate." A similar provision exists in Section 209(a)(1) (49 U.S.C. 309(a)(1)) with respect to contract carrier "permits."

[3] 49 C.F.R. 1131.4(a)(2) provides in part: "While a grant of temporary authority is neither a permit nor a certificate under the Interstate Commerce Act it nevertheless enables the applicant to provide service either as a common or a contract carrier, as the case may be."

initiate rulemaking with respect to state registration of "temporary authorities."[4]

3. Appellant finally contends that the Commission's decision is arbitrary and unsupported. The district court, after reviewing the record, concluded that "there is ample evidence in the record, from the comments submitted by several States, of variations in notification procedures previously required by the States, and this is intertwined with the general problem of delay" (J.S. App. 9a-10a). The court observed that "the validity of the action of the Commission would not seem to depend upon proof of finding of any specified number of days of delay," and held that the objective of the rule—to achieve more expeditious commencement of carrier services —"is not without rational support" (*ibid.*). There is no occasion for plenary review of such essentially factual issues.

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[4] Appellant correctly observes (J.S. 17) that the regulations it certified to the Commission in 1966, and which the Commission promulgated, included a section dealing with temporary authorities. It was advantageous for all concerned for the States, through appellant, to agree upon such procedures and embody them in a single set of rules without the need for the Commission to exercise the powers it now has exercised. That an amicable resolution was possible in 1966 does not preclude the Commission from taking the course that now has become necessary to safeguard its ability effectively to issue temporary authorities.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

CARL D. LAWSON,
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